

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACKIE VERNON SAUNDERS,

Defendant-Appellant.

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UNPUBLISHED

February 5, 2008

No. 275449

Macomb Circuit Court

LC No. 2006-000362-FH

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury-based convictions of second-degree home invasion, MCL 750.110a(3), and possession of a burglar tool, MCL 750.116, for which the trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 4 to 15 years and 2 to 10 years, respectively. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

The prosecutor presented evidence that defendant used a crowbar to remove a screen from a window in a vacant house, and had begun to enter the dwelling when he was discovered by a mail carrier, and was then detained by a police officer. On appeal, defendant asserts that he was convicted without benefit of effective assistance of counsel, and that the trial court committed instructional error.

I. Assistance of Counsel

Defendant argues that his trial lawyer was ineffective for failing to seek suppression of the incriminating statements defendant made to the arresting police officer.

“In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel’s poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

The arresting police officer testified that he had been dispatched to a home invasion in progress, then spotted defendant as fitting the description of the offender, and ordered him to the ground. According to the officer, he asked defendant what he was doing, and defendant replied that he had been at the house in question, then “stated something along the lines of I was breaking in that house to steal goods for drugs,” whereupon the officer arrested him.

Defendant argues that this confession was subject to suppression, because he had not been advised of his *Miranda*<sup>1</sup> warnings. See *New York v Harris*, 495 US 14, 20; 110 S Ct 1640; 109 L Ed 2d 13 (1990); *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Plaintiff argues that a motion to suppress would have been futile because the questioning at issue did not constitute a custodial interrogation. See *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980); *People v McElhaney*, 215 Mich App 269, 278; 545 NW2d 18 (1996). We need not reach that question, however, because the record well supports the conclusion that suppression of defendant’s incriminating statements would not have affected the outcome of trial. *Messenger, supra*.

The mail carrier who came upon defendant described finding defendant holding a bag and stepping out of a bedroom window, with one leg inside the house and one leg outside. Another witness testified that she observed, from a nearby house, a person she believed to be, but was not certain was, defendant trying the doors, then using a crowbar to open the window and begin climbing into the home, aborting that effort only when confronted by the mail carrier. The arresting police officer testified that when he investigated the house he discovered that a screen had been removed at the “point of entry,” and the surrounding wood featured “pry marks.” That defendant had no rights on the premises is not at issue.

In light of this abundance of unchallenged evidence of defendant’s guilt, we are confident that suppression of defendant’s incriminating statements to the police would not have resulted in a different verdict. Accordingly, defendant’s claim of ineffective assistance of counsel predicated on the failure to seek that suppression must fail. *Messenger, supra*.

## II. Instructions

Defendant argues that the trial court erred in denying his request for a jury instruction on attempted second-degree home invasion. See MCL 750.92. We disagree.

“Questions of law, including questions of the applicability of jury instructions, are reviewed de novo.” *People v Perez*, 469 Mich 415, 418; 670 Mich 655 (2003). “[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). However, an instruction on a cognate lesser included offense is not

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

permitted. *Id.* at 359, citing MCL 768.32(1); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

“Neither an attempt to commit an offense nor all the elements of an attempt to commit an offense are elements of the completed offense.” *People v Adams*, 416 Mich 53, 57; 330 NW2d 634 (1982). Accordingly, despite the generally held view that attempt is a lesser-included offense of the completed one, in this state an “attempt is a cognate lesser-included offense of the underlying offense . . . .” *People v Johnson*, 195 Mich App 571, 574; 491 NW2d 622 (1992). In this case, because the request for an instruction on attempt was a request for an instruction on a cognate lesser included offense, the trial court properly denied it.

We affirm.

/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto